



BOARD OF INQUIRY (*Human Rights Code*)

library

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Oscar Anonuevo dated January 26, 1994, alleging discrimination in employment on the basis of handicap, by General Motors of Canada Ltd., Pat Cowling, Dave Freeman, Canadian Autoworkers' Union, Local 303 and CAW-Canada National Union.

B E T W E E N :

Ontario Human Rights Commission

- and -

Oscar Anonuevo

Complainants

- and -

General Motors of Canada Ltd.
Pat Cowling, Dave Freeman,
Canadian Autoworkers Union, Local 303
CAW-Canada National Union

Respondents

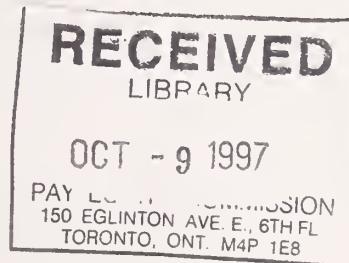
INTERIM DECISION

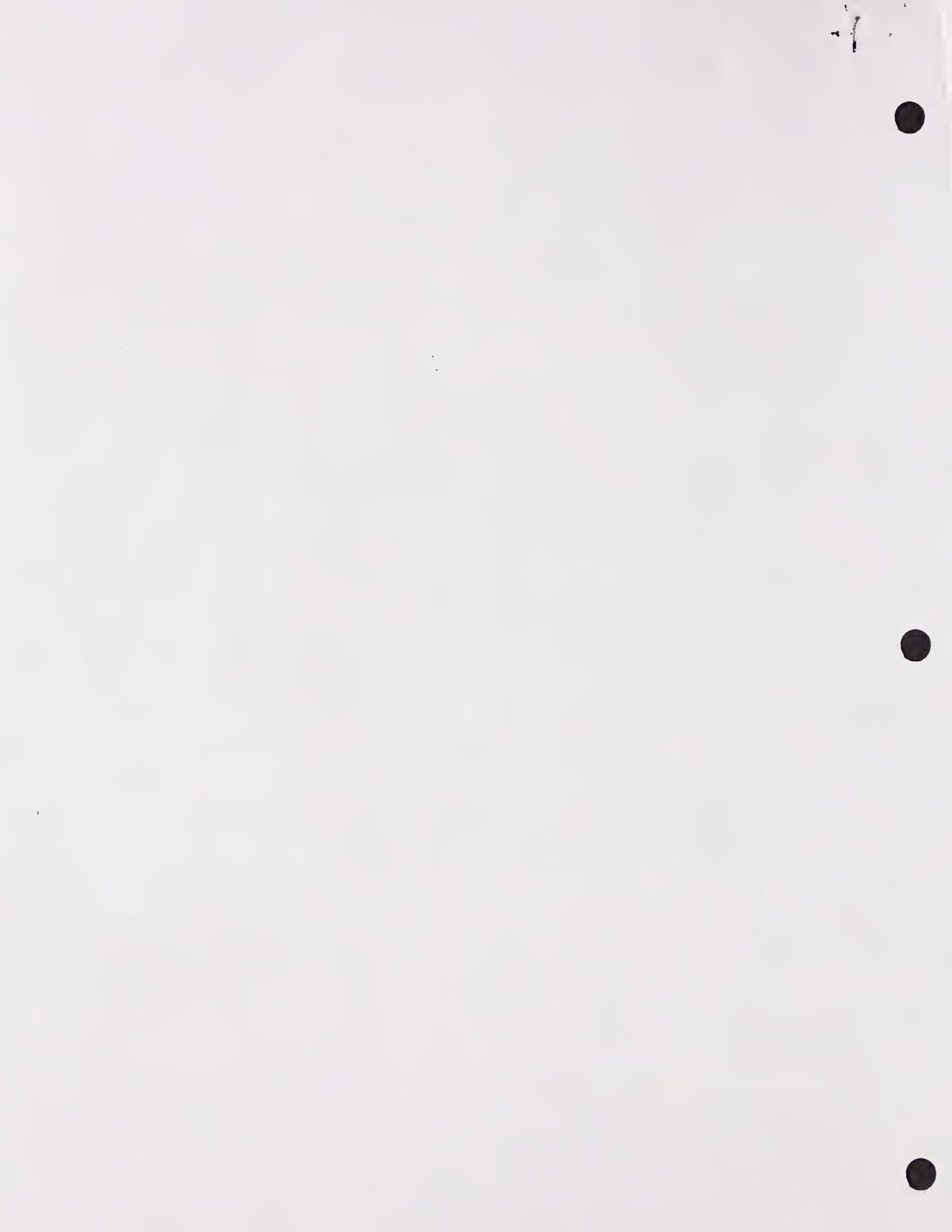
Adjudicator : Mary Anne McKellar

Date : October 6, 1997

Board File No: BI-0053-95

Decision No : 97-022-I





A P P E A R A N C E S

Ontario Human Rights Commission	)	John Judge, Counsel
	)	Liz Pillon, Counsel
Estate of O. Anonuevo, Complainant	)	Mrs. Edna Anonuevo
)	
General Motors of Canada, Corporate Respondent	)	Jason Hanson/Mahmud Jamal, Counsel
	)	Elisabeth Campin, Counsel
Mr. Pat Cowling, Personal Respondent	)	Jason Hanson /Mahmud Jamal, Counsel
	)	Elisabeth Campin, Counsel
Mr. D. Freeman, Personal Respondent	)	On his own behalf
)	
Canadian Autoworkers Union, Local 303 Corporate Respondent	)	Lewis Gottheil, Counsel
)	
CAW- Canada, National Union Corporate Respondent	)	Lewis Gottheil, Counsel
)	



BACKGROUND

1. The factual allegations that ground this Complaint relate to events that occurred in 1987 and 1988. Subsequent to his filing of the Complaint, the Complainant died. This proceeding is being continued in his name by his estate. All references to the Complainant in this decision include both Oscar Anonuevo and his estate, unless the context clearly indicates otherwise.
2. By decision dated December 27, 1996, Dr. Naresh Agarwal, who had been assigned to hear this matter, rendered an interim decision with respect to several preliminary motions ("the Agarwal Decision"). Still outstanding before Dr. Agarwal at that time were Notices of Motion in which the Respondents General Motors of Canada Ltd. ("General Motors") and Pat Cowling and the Respondent the Canadian Automobile Workers ("the CAW") and its Local 303, sought to have the Complaint dismissed as constituting an abuse of process. Prior to hearing these motions, Dr. Agarwal resigned from the case, and the Chair of the Board of Inquiry reassigned the matter to me.
3. Subsequent to Dr. Agarwal's resignation and the Chair's reassignment of the case, the Respondents General Motors and Pat Cowling commenced an Application for Judicial Review in which they challenge the Ontario Human Rights Commission's ("the Commission") handling of this Complaint, including its referral of the matter to a Board of Inquiry; the Board of Inquiry's jurisdiction to hear the matter; several of the rulings contained in the Agarwal Decision; and the Chair's decision to reassign the case. The Application for Judicial Review will be heard in early 1998.
4. In the meantime, the parties agreed, without prejudice to any position they may take on the Judicial Review Application, that I should hear the outstanding abuse of process motion. September 29 and 30, October 1, and November 10 and 12, 1997 were scheduled for this purpose. The Respondents, General Motors and Pat Cowling and the Respondents CAW and its Local 303 served and filed new Notices of Motion respecting their abuse of process motion, including, in addition to the grounds previously relied on by them, reliance on a number of facts that arose subsequent to the release of the Agarwal Decision. The Commission also filed a Notice of Motion, seeking disclosure

of various documents from General Motors and Pat Cowling and from the CAW and its Local 303. The Commission maintains that it needs these documents in order to respond to the abuse of process motion.

5. The Commission's motion for disclosure was heard on September 29, 1997. It was supported by the Complainant and by the Respondent, Dave Freeman. It was opposed by the Respondents General Motors and Pat Cowling and by the Respondents the CAW and its Local 303.

DECISION

6. The following order was communicated to the parties in a letter from the Tribunals' Office dated September 30, 1997:

General Motors of Canada Limited and Pat Cowling are ordered to:

(1) advise all other parties in this matter whether they or either of them are in possession of the documents listed in Schedule "A" to the Commission's Notice of Motion dated September 23, 1997, and if not, to advise to the best of their knowledge, who may be in possession of them;

(2) produce to all other parties the documents in their possession that are listed in Paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11 of Schedule "A" to the Commission's Notice of Motion dated September 23, 1997, with the proviso that "last known employees address" may be excised from the documents to be produced in accordance with Paragraph 1, and the names of disabled employees may be excised from the documents to be produced in accordance with Paragraphs 8 and 9; and

(3) to produce to all other parties such of the documents listed in Paragraph 3 of Schedule "A" to the Commission's Notice of Motion dated September 23, 1997, as may be in the possession of either of them, regardless of whether they are also in the possession of the physician(s) employed by General Motors.

The Canadian Automobile Workers Union and its Local 303 are ordered to:

- (1) advise all other parties in this matter whether they or either of them are in possession of the documents listed in Schedule "B" to the Commission's Notice of Motion dated September 23, 1997, and if not, to advise to the best of their knowledge, who may be in possession of them;
- (2) produce to all other parties the documents in their possession that are listed in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Schedule "B" to the Commission's Notice of Motion dated September 23, 1997, with the proviso that the names of disabled employees may be excised from the documents to be produced in accordance with Paragraphs 7 and 8.

ANALYSIS

7. One of the grounds raised in each of the abuse of process motions relates to the alleged prejudice that the moving parties on those motions would suffer if this matter were adjudicated now, some 10 years after the events on which the Complaint is based are alleged to have occurred. This prejudice is said to arise in part because previously available evidence has become unavailable during that period of time: the Complainant and other potential witnesses have died; the workplace has closed; and records or documents have disappeared.

8. The Commission asserts that, in order for it to make submissions on the extent of the prejudice occasioned by the missing evidence, it needs to know the extent of the evidence that remains available. It submits that the documents it seeks to have disclosed on its motion are relevant

to the Complaint on its merits, and are therefore relevant to whether it would be abusive to allow that Complaint to be adjudicated on its merits.

9. The Commission relies on Rule 42 of the Board of Inquiry's *Rules of Practice* in support of its position. I will also be referring to Rule 41 in these reasons.

41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.

42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses and witness statements for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

10. Rules 41 and 42 were promulgated pursuant to s. 5.4(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended ("the *SPPA*"), which cross-references s. 25.1 of the *SPPA*. Both sections are reproduced below:

5.4(1) At any stage of the proceeding before completion of the hearing, the tribunal may, if its rules made under section 25.1 deal with the matter, and subject to the Act under which the proceeding arises, make orders for,

- (a) the exchange of documents;
- (b) the written or oral examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure.

25.1 (1) A tribunal may make rules governing the practice and procedure before it.
(2) The rules may be of general or particular application.
(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

.....

11. General Motors and Pat Cowling and the CAW and its Local 303 oppose the motion on several grounds. One ground of opposition relates to the character of the material sought to be disclosed: it is submitted that some of it is not relevant to the abuse of process motion; that some of it is confidential in nature; and that some of it is not in the possession of the Respondents. The second ground of opposition is based on the fact that the Commission made a previous disclosure request that was the subject of one of the rulings contained in the Agarwal Decision, and ought not to be able to revisit the matter. The third ground of opposition is that the Commission has already had the opportunity during its investigation of this matter to amass all documentation relevant to the proceeding, and is statutorily presumed to have reviewed the material and reached conclusions with respect to the existence of prejudice. In all these circumstances, given that Rule 42 orders are discretionary in nature, it is submitted that the rule should not be applied so as to permit a disclosure order to be made against these Respondents. In the succeeding paragraphs I deal with each of these arguments.

12. The documents which the Commission seeks to have disclosed have been enumerated in *subpoenae duces tecum* served by the Commission on representatives of General Motors and the CAW. In the absence of a disclosure order, production of those documents would be enforceable pursuant to those *subpoenae*, providing that they are relevant to these proceedings and not otherwise exempt from production. The purpose of a disclosure order prior to the hearing is to expedite the process by eliminating the delays frequently associated with disclosure that occurs during a hearing where it may necessitate adjournments to permit review of the documents.

13. I deal first with the nature of the documents for which disclosure is requested. Most of the documents appear to be arguably relevant to a critical legal issue in the Complaint: what was done to accommodate the Complainant and was it reasonable in the circumstances having regard to, *inter alia*, the seniority and other provisions of the relevant collective agreements? The remainder of the documents pertain to the potential damages that might be awarded in the event a contravention of the *Code* is found to have occurred. In their abuse of process motions General Motors and Pat Cowling and the CAW and its Local 303 posit that they have suffered prejudice in respect of their ability to defend this Complaint. Presumably, they would be defending on both the issue of liability and

damages. I therefore conclude that the existence and the contents of documents arguably relevant to those issues is germane to the abuse of process motion and ought to be disclosed, unless there is something about those documents that precludes my ordering their disclosure.

14. It was submitted that I was precluded from ordering disclosure of the Complainant's medical records in the possession of General Motors' medical staff, and was also precluded from ordering disclosure of documents containing confidential information about persons not party to the Complaint. Counsel for General Motors submitted that the Complainant's medical records were in the possession of its medical staff and were statutorily privileged from disclosure without an executed release. Counsel for the Commission indicated that he would arrange to have the appropriate release prepared. I assume that the documents will be forthcoming from the medical staff pursuant to that release. I note only that if the documents are in fact in the possession of General Motors as well as in the possession of its medical officers, General Motors cannot rely on the physician's statutory ability to resist disclosing without a release, and I have so ordered.

15. Certain of the other documents that the Commission seeks to have disclosed contain confidential medical information about persons not party to the Complaint. It was argued that they were therefore not subject to disclosure. Section 8 of the *Canadian Charter of Rights and Freedoms* and the Supreme Court of Canada decision in *R. v. O'Connor* were relied on in support of this proposition. Counsel for the Commission undertook to confine his use of such information to the purposes of this litigation only, and suggested that I could make an order to similar effect that would bind all parties. He also offered that there might be ways to excise identifying information from the records to overcome this problem. Keeping in mind that the disclosure sought is for the stated purpose of enabling the Commission to make submissions on whether sufficient evidence exists to defeat the contention that the Respondents are prejudiced to such an extent that the continuation of this hearing would constitute an abuse of process, I have concluded that the Commission does not need to be able to identify individual disabled employees in order to make submissions about the evidentiary sufficiency of the records. I have therefore ordered that the names of the employees be excised from certain documents I have ordered to be produced. Since issuing the order, I understand that a further dispute

may arise as to whether the documents contain information other than employees' names which might serve to identify them, and whether that information ought to be excised also. In the event that this issue requires my determination, the parties have agreed to do the following. General Motors will provide the documents with the excisions that its Counsel feels are necessary to maintain the confidentiality of employees' identities. Any party objecting to the extent of the excisions will file written submissions by October 27, 1997. Responding submission will be filed by November 3, 1997.

16. The Agarwal Decision ordered that certain documents be produced to the Commission, namely those on which the Respondents "intend to rely" at the hearing. There may, however, be relevant documents in existence upon which the Respondents have no intention of relying. The Commission now requests production of such of them as fall within those items enumerated in the schedules to its Notice of Motion. The Respondents assert that the Commission is essentially revisiting the same issue addressed in the Agarwal Decision. I disagree. The relief sought and granted in the Agarwal Decision was essentially an order that the Respondents comply with the predecessor to Rule 41 and disclose "**the documents on which they intend to rely**". The relief sought in this motion is for a discretionary order under Rule 42 of documents "**the panel considers appropriate for a full and satisfactory understanding of the issues**". A motion for disclosure under Rule 42 can be made at any time during the course of a hearing. The Rules clearly contemplate that the issue of disclosure may be addressed on more than one occasion, although I might add that it is certainly more expeditious to deal with all disclosure issues at once rather than dealing with a series of separate motions. Because I find that this motion is different from the one dealt with in the Agarwal Decision, I also do not accept the Respondents' arguments that to allow this motion necessarily opens the door to a revisiting of all of the other determinations contained in the Agarwal Decision.

17. A prerequisite to the exercise of my discretion under Rule 42 is that I conclude the documents for which disclosure is sought are "**appropriate for a full and satisfactory understanding of the issues**". I have already indicated in Paragraph 11 above that I am satisfied these documents are germane to the issues in dispute on the abuse of process motion. As well, disclosure of them is sought in relation to a matter in which the Commission is the responding rather than the moving party and seeks to disprove

a negative: the Respondents' assertion that there is inadequate evidence now in existence to permit a fair hearing to occur. All of these circumstances warrant my exercise of discretion in favour of making the Rule 42 order.

18. There was some suggestion by the Respondents that the Commission's conduct disentitled it to discretionary relief. The Respondents pointed to the broad investigative powers granted the Commission under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*"). I agree that those powers are sweeping indeed and that some, if not all, of the documents for which production is now sought might have been obtained by the Commission during that process. I also agree that the *Code* requires the Commission to determine whether the evidence warrants an inquiry into a complaint and, in some circumstances, to determine whether there has been substantial prejudice to the respondent(s). I do not think it is possible to necessarily conclude, however, from the mere fact that copies of certain documents germane to these issues were not retained, that the Commission did not undertake any or all of its statutorily-mandated determinations. Of course, additional facts might well exist that would lead one to conclude that that was the case. The Respondents also urged me to have regard to earlier Board of Inquiry decisions holding that the Commission is not entitled to disclosure because it is in control of the investigation, and therefore has a "leg up" on the other parties. I was also reminded that the Commission had brought one disclosure motion already in which it failed to seek all the relief it might have. Without deciding: (1) whether the Board of Inquiry has the equitable jurisdiction to decline a discretionary order on the basis of the moving party's conduct, either before or after the complaint has been referred to the Board; (2) the extent of any such jurisdiction; or (3) the factors that ought to be considered in exercising it; I decline to refuse the order sought here on the basis of the Commission's conduct. I note that in investigating the merits of a complaint the Commission may not always anticipate and amass the documentation that might prove relevant to a preliminary motion should the matter be referred and proceed to adjudication. I also note that where Rules of Practice are promulgated for the first time and introduce new procedural rights and responsibilities (such as mutual disclosure), and in the absence of any guidance from jurisprudence interpreting them, the parties' learning curve may be steeper, and their motions may not be framed with

the precision that one would be entitled to expect might accompany a longer familiarity with those Rules.

Dated at Toronto this 7th day of October, 1997.

Mary Anne McKellar
Mary Anne McKellar
Member, Board of Inquiry

